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No. 84-634

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHEVRON U.S.A., INC., ET AL., PETITIONERS

v.

WILLIAM J. SHEFFIELD,
GOVERNOR OF THE STATE OF ALASKA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. For the reasons set forth below, the United States believes that the court of appeals incorrectly held that the ballasting and deballasting provisions of the Alaska Tanker Law were not preempted by federal regulations, but that the limited impact of the court's decision renders review by this Court unnecessary. In addition, we believe that review would be inappropriate in this case because the courts below failed to address several legal questions that are of considerable relevance to the question presented and as to which this Court should have the benefit of analysis by lower courts.

1. The United States participated as amicus curiae in the district court and the court of appeals to urge that the deballasting prohibition contained in Alaska Stat. § 46.03.750(e) (Supp. 1977)[1] is preempted by regulations promulgated pursuant to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), 46 U.S.C. 391a, as amended by the Port and Tanker Safety Act of 1978 (PTSA), Pub. L. No. 95-474, 92 Stat. 1471 *et seq.*[2] It has been the position of the United States throughout this litigation that the PWSA and the PTSA systematically regulate pollution resulting from oil tanker operations and that the interest in a nationally uniform approach to the problem of oil pollution from vessels leaves no room for varying state regulations.

Congress first mandated the comprehensive regulation of tanker design, equipment, and operation to combat the problem of oil pollution when it passed the PWSA in 1972. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978), this Court considered Congress's purposes in enacting the PWSA and concluded that "Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements." The present controversy

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[1]This was the Alaska statute in effect at the time petitioners filed this action. The statute was amended in 1980 (Alaska Stat. § 46.03.750 (1980)), but the amendments do not alter the absolute prohibition against deballasting in state waters that remains at the heart of the present controversy.

[2]At the time petitioners filed this action, the PWSA was the only relevant federal statute dealing with the subject of deballasting. In 1978, Congress passed the PTSA. Although the PTSA provided that it was an amendment to the PWSA (92 Stat. 1471), it effectively replaced that Act. In 1983, as part of a partial revision and consolidation of Title 46 of the United States Code, both statutes were merged, and those provisions that are pertinent to this litigation are to be codified principally at 46 U.S.C. 3701-3718 (Pub. L. No. 98-89, 97 Stat. 520 *et seq.*).

involves operating regulations promulgated under the PWSA rather than design standards. Nevertheless, *Ray* provides the appropriate framework for analysis because design and operating requirements can be and in this case are intimately and inextricably linked in the integrated approach to the oil pollution problem deemed necessary by Congress. The legislative history of the PWSA clearly shows that Congress contemplated a "systems" approach because regulations affecting one area, such as design specifications, often have a ripple effect on other areas, such as construction requirements or operating standards. See S. Rep. 92-724, 92d Cong., 2d Sess. 12-14 (1972).

In accordance with its intent to promote a coordinated approach to the problems of oil pollution caused by vessels, Title I of the PWSA encompassed vessel traffic control, operating conditions, and navigational equipment, while Title II required the Coast Guard to establish regulations for the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, or manning" of oil tankers. 46 U.S.C. 391a(6)(A). In 1978, Congress incorporated the PWSA into the newly enacted PTSA (see note 2, *supra*), again stressing the interrelationship among design, construction, and operating standards (see Section 5 of the PTSA, 92 Stat. 1483), and again specifically directing the promulgation of regulations to promote "the reduction or elimination of discharges during ballasting, deballasting, tank cleaning, cargo handling, or other such activity" (*ibid.*). These provisions continue in force today (see note 2, *supra*).

Pursuant to the mandate of Title II of the PWSA to establish necessary regulations with respect to the design, construction, and operation of oil tankers (46 U.S.C. 391a(6)(A)), the Coast Guard promulgated regulations including design requirements and operating regulations controlling the discharge of ballast water. 33 C.F.R. Pt.

157. Under these regulations, "oily" ballast water may be discharged only if a vessel is proceeding en route more than 50 miles from the nearest land and if other specified conditions are met. 33 C.F.R. 157.37(a). Within 50 miles of the shoreline, tankers generally are prohibited from discharging "oily" ballast (33 C.F.R. 157.29), but they may discharge "clean" ballast (33 C.F.R. 157.03(e) and 157.43(a)).[3] In promulgating these and other operational standards, the Coast Guard has consistently employed the "systems" approach intended by Congress, in recognition of the interrelationship of design, construction, and operating requirements. See generally 33 C.F.R. Pt. 157.

2. The conflict between the applicable federal regulations and the Alaska statute is evident. As part of its comprehensive regulatory scheme, the Coast Guard permits the discharge of clean ballast in any waters and the discharge of dirty ballast more than 50 miles offshore under strict conditions. Alaska, attempting to deal with the problem of oil

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[3]The Coast Guard's regulations and the authorizing legislation impose standards largely derived from international agreements. In promulgating its regulations, the Coast Guard was guided by standards contained in the International Convention for the Prevention of Pollution from Ships, 1973 (Annex 1, Regulation 9), 12 I.L.M. 1319, 1343 (1973) [hereinafter cited as MARPOL 1973]. MARPOL 1973 was never ratified by the United States nor by a sufficient number of other nations to permit it to enter into force internationally. However, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, 17 I.L.M. 546 (1978) [hereinafter cited as MARPOL Protocol], modified or incorporated the standards contained in MARPOL 1973. See Art. I of the MARPOL Protocol, 17 I.L.M. 547. Subsequently, in 1980, Congress passed legislation to implement the MARPOL Protocol domestically (Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*), and the MARPOL Protocol entered into force internationally on October 2, 1983. The Act to Prevent Pollution from Ships, like the PWSA, the PTSA, and the Coast Guard's implementing regulations, reflects congressional recognition that oil pollution from tankers must be dealt with in a uniform manner on the international level. See generally H.R. Rep. 96-1224, 96th Cong., 2d Sess. 4 (1980); see also *Ray*, 435 U.S. at 166-168.

pollution from tankers in a different manner, totally prohibits the discharge into state waters of ballast water from a cargo tank of a tank vessel.

Nevertheless, the court of appeals reversed the district court's conclusion that the Alaska statute was preempted by the federal regulations (Pet. App. 1a-37a). In so doing, the court of appeals failed to recognize the importance of regulatory uniformity emphasized by this Court in *Ray*. This failure stemmed largely from the court's attempt to isolate each element of the comprehensive regulatory scheme deemed necessary by Congress. The court thus dismissed the significance of *Ray* by noting that it dealt only with the *design* and *construction* characteristics of tankers (Pet. App. 6a, 8a). But Congress has determined, in the PWSA and the PTSA, that oil pollution from tankers must be dealt with by regulating all aspects of the problem — design, construction, *and* operation — in an integrated fashion. As this Court observed in *Ray*, 435 U.S. at 154 (emphasis added), "[t]he PWSA * * * subjects to federal rule the design and *operating* characteristics of oil tankers." In our view, therefore, the court of appeals erred by failing to recognize that the need for uniformity is as great in the area of operating standards as it is in the area of design and construction standards. The court further erred in its attempt to pigeon-hole vessel operations, vessel design, and vessel construction. The integrated approach mandated by Congress does not permit such compartmentalization of a single problem.

Moreover, the court of appeals' review of the preemptive nature of the regulations issued to implement the PWSA and the PTSA was fundamentally flawed by its mistaken assumption (Pet. App. 10a, 13a-14a) that the discharges at issue are subject to the National Pollutant Discharge Elimination System (NPDES) of the Clean Water Act (CWA), 33 U.S.C. 1342. In fact, the regulations promulgated by the

Environmental Protection Agency to implement the NPDES program specifically exempt from the NPDES permit program discharges from vessels incident to their normal operations. 40 C.F.R. 122.3(a). Thus, much of the court's analysis, including its conclusion that "the Alaska statute at issue in this case is converted by the CWA into a federal standard which the EPA is required to enforce" (Pet. App. 13a-14a), rests on a legally erroneous premise.

3.a. Preemption issues inevitably raise sensitive questions concerning the respective roles of the national and state governments in our federal system. Because the decision of the court of appeals is of limited impact and is not in direct conflict with any decision of this Court or any other court of appeals, it is unnecessary for the Court to undertake resolution of these questions in the present case. Only one vessel — Chevron's *Alaska Standard* — is affected by the court of appeals' decision (see Br. in Opp. 5-6), and, as noted by respondents (*id.* at 5), onshore reception facilities permit that vessel to comply with the Alaska statute at some ports, though not all. To date, no other state has enacted a law similar to Alaska's deballasting prohibition. In these circumstances, further review is not warranted.

b. In addition to the limited impact of the decision below, we believe that other factors counsel against review by this Court. Although the court of appeals clearly erred in concluding that the NPDES program has any relationship to this case, it is possible that another section of the CWA, basically dismissed by the court of appeals as irrelevant (see Pet. App. 14a n.9), does have a bearing on the proper resolution of the case. Section 311 of the CWA, 33 U.S.C. 1321, deals specifically with discharges of oil and other hazardous substances, and it does not contain an exemption for discharges from vessels. Section 311(b)(1), 33 U.S.C. 1321(b)(1), establishes a general "no discharge" policy for oil and other hazardous substances. Section 311(b)(3)

further prohibits discharges of oil into the navigable waters of the United States except in such quantities or locations as the President (who has delegated his authority to the Administrator of the Environmental Protection Agency) has determined not to be harmful. In determining harmful quantities, the President is required to take into account applicable water quality standards, which are established by the states (*ibid.*). EPA's regulations implementing Section 311 provide that any discharge of oil that violates applicable water quality standards is deemed "harmful" and is therefore prohibited (40 C.F.R. 110.3).

Accordingly, the first question that arises under Section 311, which was not addressed by the courts below, is whether the challenged Alaska statute prohibiting deballasting in state waters is an "applicable water quality standard" within the meaning of Section 311(b)(3). Until its amendment in 1980, Alaska Stat. § 46.03.750(a) (Supp. 1977) tied the deballasting prohibition to the State's water quality standards (see Br. in Opp. App. 1). When the statute was amended, however, the reference to state water quality standards was deleted (see *id.* at App. 2). The record does not contain any explanation for this particular change, and it is thus unclear whether the Alaska statute remains a state water quality standard enforceable through Section 311 of the CWA. (The district court did discuss Section 311 at length (see Pet. App. 46a-52a), but it did not consider whether the challenged Alaska statute might constitute a state water quality standard or the consequences of such a determination.)

Assuming, arguendo, that the Alaska statute could be construed as a state water quality standard, another question not addressed by the courts below is whether the provisions of the PWSA and the PTSA and their implementing regulations, which permit the discharge of "clean" ballast, would take precedence over Section 311 of the CWA in light

of Section 311(b)(3)'s requirement that the determination of "harmful" discharges of oil must be consistent with "maritime safety and with marine and navigation laws and regulations." This would be an entirely different "preemption" inquiry than the one undertaken by the court of appeals; instead of examining the consistency of the state statute with federal regulations, the question would involve the proper reconciliation of several different federal statutes.

Because these unsettled questions, which might well be determinative of the correct resolution of this case, do not appear to have received adequate treatment in the lower courts, the United States believes that it would be inappropriate for this Court to attempt to resolve them in the first instance. The limited impact of the decision in this case, discussed above, makes it particularly inappropriate to undertake resolution of new and complicated legal issues in this Court.[4]

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[4]Finally, we note that the Court may lack jurisdiction to entertain the petition. The time within which to file a petition for a writ of certiorari in this case expired on June 2, 1984, but the petition was not lodged with the Court until June 4, 1984. On June 18, 1984, this Court denied leave to file the petition out of time. Br. in Opp. 2. Although the court of appeals granted petitioners' motion to file an out-of-time petition for rehearing, that action was not taken until June 13, 1984, after the time for filing the petition for a writ of certiorari already had expired. Pet. 1. There is authority for the proposition that a petition for rehearing must be filed before the expiration of the time for filing a petition for a writ of certiorari. See *Conboy* v. *First National Bank*, 203 U.S. 141, 145 (1906); R. Stern & E. Gressman, *Supreme Court Practice* 400 (5th ed. 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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